

1 HUBEL, Magistrate Judge:

2 The plaintiff David McBroom brings a civil rights action under
3 42 U.S.C. § 1983, and a state-law claim for negligence, based on
4 the alleged violation of his rights under the fourth amendment to
5 the U.S. Constitution. McBroom alleges the defendant Aaron
6 Turnage, who is a Gresham, Oregon, police officer, "interrogated[,]
7 detained and arrested [him] without reasonable suspicion and
8 probable cause." Dkt. #1, ¶ 9. He alleges the defendant City of
9 Gresham (the "City") was negligent in "[f]ailing to hire, train and
10 supervise employees regarding reasonable suspicion, probable cause
11 and the 4th Amendment, interrogating and dealing with the public
12 lawfully[.]" *Id.*, ¶ 22.

13 McBroom has filed a motion for "partial summary judgment as to
14 liability on all his claims." Dkt. #17. The defendants argue
15 summary judgment is precluded by the existence of numerous issues
16 of material fact. In addition, the defendants initially argued
17 McBroom had failed to establish the facts sufficiently to overcome
18 Turnage's qualified immunity defense on summary judgment.
19 Dkt. #21. However, following oral argument on August 13, 2013, the
20 defendants "now concede dismissal of their qualified immunity
21 defense because of clear questions of fact which permeate the
22 entire encounter between McBroom and Turnage and necessitate a jury
23 trial." Dkt. #27. As such, summary judgment should be granted in
24 McBroom's favor on the qualified immunity defense.

25 The motion is fully briefed, and the undersigned submits the
26 following findings and recommended disposition of the case pursuant
27 to 28 U.S.C. § 636(b) (1) (B) .

SUMMARY JUDGMENT STANDARDS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)).

The Ninth Circuit Court of Appeals has described "the shifting burden of proof governing motions for summary judgment" as follows:

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S. Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Id.* at 324, 106 S. Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be

drawn in its favor. *Id.* at 255, 106 S. Ct. 2505.

In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010).

SECTION 1983 STANDARDS GENERALLY

Section 1983 provides, in relevant part, that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983.

To prevail in a claim under 42 U.S.C. § 1983, the plaintiff must show that “a person acting under color of state law” deprived the plaintiff “of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d 420 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Section 1983 “is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed.” *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 811-812, 127 L. Ed. 2d 114 (1994) (internal citations and quotation marks omitted).

STANDARDS FOR FOURTH AMENDMENT VIOLATIONS

"To move forward on 42 U.S.C. § 1983 and state law false arrest claims, a plaintiff must establish that his arrest was not supported by probable cause." *Biolchini v. City of Bend*, 2010 WL 5891613 at *4 (D. Or. Dec. 28, 2010) (Coffin, MJ) (citing *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Bacon v. City of Tigard*, 81 Or. App. 147, 147 (1986) "(clarifying that probable cause is a complete defense to a false arrest claim)"). Chief Judge Aiken of this court recently discussed the standards for determining whether probable cause to arrest exists:

Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989). The question is whether the arresting officer's actions are objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Graham v. Connor*, 490 U.S. 386, 397[, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443] (1989).

Wilson v. Lane County Sheriff's Office, slip op., 2012 WL 6738279 at *3 (D. Or. Dec. 21, 2012).

An encounter need not lead to arrest to implicate the fourth amendment. "The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest.'" *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002) (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740 (2002), in turn citing *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873, 20 L. Ed. 2d 889 (1968)). In order to justify a "brief, investigatory

1 search or seizure," officers must have "a reasonable, articulable
 2 suspicion that justifies their actions. The reasonable suspicion
 3 standard 'is a less demanding standard than probable cause,' and
 4 merely requires 'a minimal level of objective justification.'" *Id.*
 5 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673,
 6 675-76, 145 L. Ed. 2d 570 (2000); citing *Arvizu*, 534, U.S. at 273,
 7 122 S. Ct. at 750).

8 9 **NEGLIGENCE STANDARDS**

10 McBroom claims the City was negligent in "[f]ailing to hire,
 11 train and supervise employees regarding reasonable suspicion,
 12 probable cause and the 4th Amendment, interrogating and dealing
 13 with the public lawfully[.]" Dkt. #1, ¶ 22. To prevail on this
 14 claim, McBroom must show the City's hiring, training, or supervi-
 15 sion of its officers was "sufficiently inadequate as to constitute
 16 'deliberate indifference' to the rights of persons with whom the
 17 [officers] come into contact." *Davis v. City of Ellensburg*, 869
 18 F.2d 1230, 1235 (9th Cir. 1989) (citing *City of Canton v. Harris*,
 19 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)).

20 21 **DISCUSSION**

22 Little discussion is required in order to rule on McBroom's
 23 motion. The facts as pled by the parties, viewed in the light most
 24 favorable to the defendants, demonstrate the presence of numerous
 25 issues of genuine, material fact that preclude summary judgment on
 26 any issue.

27 In 42 numbered paragraphs, McBroom alleges the following
 28 facts. (The following factual summary, including all quoted por-

tions, is taken from McBroom's numbered paragraphs 1-42, at pages 3-6 of his brief, Dkt. #18.) On the morning of January 31, 2011, at approximately 1:30 a.m., McBroom was shopping in a 7-11 store in Gresham, Oregon, when he was approached by Turnage "out of the blue." McBroom claims he was looking at magazines when Turnage entered the store, and he never threatened Turnage, displayed any weapon, made any threatening gestures, committed any criminal offense, or otherwise did anything at all that would have caused Turnage to suspect him of criminal activity. According to McBroom, Turnage told him the officers were investigating a report that a man was "slumped behind the wheel of a Chevy Camaro," bearing dealer plates, that was "parked crooked and . . . running." McBroom was the only customer in the store at the time.

While Turnage was talking with McBroom, McBroom walked away from him, putting his hands in his pockets. McBroom returned to shopping, and at some point picked up a bottle of milk, which Turnage asked him to put down. McBroom alleges Turnage searched him without "valid informed consent," and without reasonable suspicion to justify a search of McBroom's person. Turnage did not conduct a field sobriety test, and did not see any bulge in McBroom's clothing suggesting a weapon. During the pat-down search, Turnage discovered what McBroom describes as "his own prescription drugs loose in his possession without the prescription." McBroom claims he was arrested on the basis of his "possession of prescription narcotic drugs without a prescription," and all criminal charges against him later were dropped.

Turnage's factual recitation differs from McBroom's version of the facts in significant respects. (The following factual summary,

1 including all quoted portions, is taken from pages 3-6 of the
2 defendants' brief, Dkt. #21.) On January 29, 2011, at about
3 1:40 a.m., Turnage and another officer were dispatched to the 7-11
4 store to investigate "a suspected drunk driver." A "911" caller
5 had "reported a male in a Chevy Camaro with dealer plates was
6 parked crooked, was drunk, was slumped over the wheel with the
7 vehicle running and the lights on[.]" When the officers arrived,
8 the Camaro was the only car in the store's parking lot; however,
9 the vehicle was not occupied. They observed a "lone male customer
10 inside the store." According to Turnage, when he entered the
11 store, a store employee identified the male customer as the man who
12 had been slumped over the wheel of the Camaro.

13 Turnage, who was in uniform and displaying his badge,
14 approached the man, who identified himself as McBroom. McBroom
15 stated he was the driver of the Camaro, and Turnage explained what
16 he was investigating. Turnage claims "McBroom showed multiple
17 signs of being intoxicated," an allegation he claims is
18 corroborated by the "911" caller, "who believed McBroom to be very
19 intoxicated and unable to safely operate a motor vehicle based upon
20 her observations of his driving."

21 Turnage states McBroom was wearing a shirt, pants, and jacket,
22 and when Turnage initially encountered him, McBroom had his hands
23 in his pockets. Turnage asked McBroom to remove his hands from his
24 pockets "for their safety," but during their conversation, McBroom
25 returned his hands to his pockets, and Turnage again asked him to
26 remove them. According to Turnage, McBroom "became uncooperative,"
27 suddenly walking away from him "and around the end of a store aisle
28 while putting his hands back into his pockets." Turnage was no

1 longer able to see what McBroom was doing. He followed McBroom,
2 who continued to walk away from him, "now with a gallon of milk in
3 his hand." Turnage claims he "ordered McBroom to put the milk down
4 and told him that he was going to pat him down for weapons."
5 Turnage patted down McBroom, finding no weapons.

6 Turnage alleges he then asked McBroom if he could search his
7 pockets, and McBroom consented. Turnage "located a small,
8 unmarked, closed pill container" in McBroom's pocket. He claims
9 McBroom gave him permission to open the bottle, in which Turnage
10 found Vicodin and Lorazepam. According to Turnage, McBroom "admit-
11 ted that he did not possess any proof that the drugs belonged to
12 him or were prescribed to him by a doctor." Turnage placed McBroom
13 under arrest, charging him "with two counts of Unlawful Possession
14 of Controlled Substances for the crime committed in the officers'
15 presence."

16 Turnage maintains that the facts and circumstances of his
17 encounter with McBroom, including the report by the "911" caller,
18 provided reasonable suspicion for him to justify the pat-down
19 search. He claims McBroom consented to the search of his pockets.

20 Considering what McBroom must prove to prevail on each of his
21 claims, under the standards set forth above, the parties' factual
22 recitations reveal the following questions of fact that preclude
23 summary judgment:

24 (1) In light of the facts and circumstances confronting him,
25 did Turnage have reasonable suspicion that McBroom had committed,
26 was committing, or was about to commit a crime, justifying his
27 brief detention and questioning of McBroom?

1 (2) Considering the totality of the circumstances, did
2 McBroom's behavior give rise to a reasonable suspicion that he
3 might be in possession of a weapon, justifying Turnage's pat-down
4 search of McBroom?

5 (3) Did McBroom voluntarily consent to a search of his
6 pockets?

7 (4) Did Turnage have probable cause to arrest McBroom?

8 McBroom argues Turnage's initial pat-down search was unwar-
9 ranted because he did not display any behavior or appearance that
10 could have led Turnage to suspect he was armed and dangerous.
11 McBroom points to the court's ruling in *Bonneau v. Murphy*, slip
12 op., 2013 WL 1386617 (D. Or. Apr. 4, 2013) (Hernandez, J), in
13 support of his claim that no reasonable officer could have
14 reasonably believed he was armed and dangerous. The facts in this
15 case differ from those in *Bonneau* in material respects. There, the
16 officer stopped Bonneau's vehicle due to a malfunctioning brake
17 light and a license plate that was difficult to read. The officer
18 found Bonneau's responses to his questions "evasive," and his
19 behavior and demeanor "highly unusual." The officer did not see
20 any suspicious bulge in Bonneau's clothing, and did not see Bonneau
21 reaching for anything in his pockets. The court held the facts of
22 the officer's encounter with Bonneau could not cause a reasonable
23 officer to suspect Bonneau might be armed and dangerous, and
24 therefore, Bonneau was granted summary judgment on the issue of
25 whether the pat-down search violated his fourth amendment rights.
26 *Id.* *Bonneau* is distinguishable on its facts.

27 Here, the officers first encountered McBroom in response to a
28 "911" call indicating a man was slumped over in a car, and appeared

1 to be drunk. The officers were dispatched to investigate "a
2 suspected drunk driver." When the officers arrived at the 7-11,
3 the car was unoccupied, and one man was shopping inside the store.
4 A store employee identified the shopper as the man who had been
5 slumped over the steering wheel. The man, who identified himself
6 as McBroom, admitted he was the driver of the Camaro. Turnage
7 observed that McBroom "showed multiple signs of being intoxicated."
8 Standing alone, evidence that McBroom may have appeared to be
9 intoxicated was not enough to provide the basis for a pat-down
10 search. See *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022
11 (9th Cir. 2009) (citing, *inter alia*, *United States v. Mattarolo*,
12 209 F.3d 1153, 1158 (9th Cir. 2000)). However, according to
13 Turnage's version of the events, McBroom repeatedly returned his
14 hands to his pockets after being asked to remove them. He became
15 increasingly more uncooperative while Turnage spoke with him,
16 eventually walking around the end of a store aisle as he again
17 placed his hands in his pockets. Turnage was unable to see what
18 McBroom was doing at that point. Under Turnage's version of the
19 facts, Turnage reasonably could have suspected that McBroom might
20 have a weapon. *Id.*; see *United States v. Flatter*, 456 F.3d 1154,
21 1158 (9th Cir. 2006) ("[S]udden movements by defendants, or
22 repeated attempts to reach for an object that was not immediately
23 visible, [are] actions that can give rise to a reasonable suspicion
24 that a defendant is armed"; citing cases).

25 In addition, McBroom has offered no evidence to support
26 summary judgment on his claim that the city was negligent. Simply
27 stated, McBroom has failed to show the absence of material facts
28 regarding any of his claims.

1 **CONCLUSION**

2 For the reasons discussed above, the undersigned recommends
3 McBroom's motion for summary judgment be granted as to Turnage's
4 qualified immunity defense, and denied in all other respects.

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6 **SCHEDULING ORDER**

7 These Findings and Recommendations will be referred to a
8 district judge. Objections, if any, are due by **September 3, 2013**.
9 If no objections are filed, then the Findings and Recommendations
10 will go under advisement on that date. If objections are filed,
11 then any response is due by **September 20, 2013**. By the earlier of
12 the response due date or the date a response is filed, the Findings
13 and Recommendations will go under advisement.

14 IT IS SO ORDERED.

15 Dated this 15th day of August, 2013.

16
17 /s/ Dennis J. Hubel

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19 Dennis James Hubel
20 Unites States Magistrate Judge
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